STATE OF MICHIGAN

COURT OF APPEALS

VALERY ESSON,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, and ACTING WARDEN, ASSISTANT DEPUTY WARDEN, and INSPECTOR OF THE DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED
October 7, 1997

No. 196012
Jackson Circuit Court
LC No. 94-070813-NO

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's June 19, 1996, order granting defendants' motion for summary disposition. We reverse and remand.

Plaintiff is a corrections officer employed by the Michigan Department of Corrections. Each of the individual defendants occupy management or supervisory positions with DOC. During March 1993, defendants received information from an inmate at the Adrian Temporary Facility where plaintiff is employed that plaintiff was selling drugs and sex to prisoners. Subsequently, defendants arranged to have several corrections officers, including plaintiff, searched by a "drug dog" for concealed drugs. Plaintiff was then subjected to a strip search which included a visual body-cavity search. Following these events, plaintiff filed a complaint against defendants alleging sexual harassment and gender discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., and civil rights violations pursuant to 42 USC 1983. The trial court dismissed all of plaintiff's claims pursuant to MCR 2.116(C)(10) on the ground that a reasonable suspicion existed to justify the search of plaintiff.

I

First, plaintiff contends that a genuine issue of material fact exists as to whether the strip search and visual body-cavity search of plaintiff was justified by reasonable suspicion. Review of the record reveals that such an issue of fact does exist, and plaintiff's claims must be remanded to the circuit court.

The trial court dismissed all of plaintiff's claims on the ground that reasonable suspicion existed to justify the strip search of plaintiff based on a report by a prison inmate that plaintiff was selling drugs and sex to inmates, and the results of the drug dog search. DOC's internal policy states that "all strip searches of employees shall be subject to . . . reasonable suspicion that the employee is concealing contraband." An employee may refuse to submit to a strip search, but refusal shall constitute grounds for dismissal. Body-cavity searches are not to be conducted absent a search warrant. The DOC defines a strip search as follows:

> Visual inspection of all body surfaces of a person who has been required to remove all or most of his/her clothing and jewelry for purposes of the search; includes visual inspection of the mouth, ears, nasal cavities, and the entrance to the vagina and rectal cavity. The person will be required to bend and spread his/her buttocks, and spread the lips of her vagina, to allow inspection. All clothing and articles which are removed shall also be inspected for contraband.

DOC defines "reasonable suspicion" as follows:

> Suspicion based on a specific fact or facts, and rational inferences drawn from those facts, based upon the knowledge and experience of Corrections staff. Examples of information on which a reasonable suspicion may be based include, but are not limited to, the following:
>
> a. A tip which is from an identified source who is reasonably reliable and credible;
>
> b. An anonymous tip which is corroborated by some other evidence;
>
> c. Discovery of a suspicious item during a frisk search;
>
> d. Observance of unusual behavior such as appearing to conceal an item in clothing.

In the case at bar, no evidence was presented that the prisoner making allegations against plaintiff had a history of providing reliable information. Further, there was evidence that plaintiff had recently informed prison officials that she suspected this prisoner of using drugs, making his allegations even less credible. Therefore, under any of the above criteria, the prisoner's allegations alone were insufficient to satisfy the reasonable suspicion standard and justify either the strip search or the visual body-cavity search of plaintiff.

While a positive indication by the drug dog that plaintiff could be concealing drugs may have provided the corroborating evidence necessary to meet the reasonable suspicion standard, conflicting evidence was presented regarding the results of the dog search. Evidence was presented that the dog's handler indicated that there was a "50/50 chance" that plaintiff was concealing drugs. However, conflicting evidence, such as written reports by Chartrand, Reynolds and Williams as well as the

deposition testimony of Reynolds and Williams, was also presented that the dog had not reacted to plaintiff in a manner which indicated that she was concealing drugs. Therefore, giving the benefit of any reasonable doubt to the nonmoving party, a genuine issue of material fact exists on the issue of whether there was a reasonable suspicion justifying the strip search and visual body-cavity search of plaintiff.

II

Next, plaintiff contends that she presented sufficient evidence in support of each of her claims to create genuine issues of material fact.

The Civil Rights Act contains a provision which is specifically designed to outlaw two forms of sexual harassment: hostile work environment sexual harassment, and quid pro quo sexual harassment. *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996). In this case, plaintiff alleges hostile work environment sexual harassment. To establish a prima facie claim of hostile work environment, a plaintiff must show: (1) that she belonged to a protected group; (2) that she was subjected to communication or conduct on the basis of sex; (3) that she was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment, or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). If an employer is accused of sexual harassment, as in this case, the respondeat inquiry is unnecessary. *Id*. at 397.

The essence of a hostile work environment action is that "one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them." *Radtke, supra* at 385. However, a single incident may create a hostile work environment were the experience is extremely traumatic, such as a rape or a violent sexual assault. *Id*. at 394-395.

Plaintiff presented evidence that she is the only female "ever in Adrian to be strip searched" and also that the dog reacted to two of the male corrections officers and they were not searched. Plaintiff testified that, as part of the strip search, she was told to disrobe and then "bend over, with my hands spread my vaginal area, my butt, she then told me to cough as hard as I could." An issue of material fact exists as to whether a reasonable suspicion existed to justify the search of plaintiff. Additionally, plaintiff's hostile work environment claim is also based on the ongoing conduct of defendants. Plaintiff alleged that one of her supervisors "screamed" at her and used “profanity” toward her in an attempt to degrade her in front of inmates. Further, plaintiff alleged that this supervisor discussed plaintiff with inmates and did not treat male employees in a similar fashion. Giving the benefit of any reasonable doubt to the nonmoving party, an issue of material fact exists as to whether plaintiff's claim describes a hostile work environment. Defendants have not shown that plaintiff's claim is impossible to support because of some deficiency which cannot be overcome.

To support a claim of disparate treatment, a plaintiff must establish by a preponderance of the evidence that a prima facie case of discrimination exists. *Smith v Consolidated Rail Corp*, 168 Mich App 773, 778; 425 NW2d 220 (1988). A plaintiff must show that she was a member of a class

entitled to protection under the act and that for the same or similar conduct, she was treated differently than one who was a member of a different gender. *Id*. If the plaintiff succeeds in presenting a prima facie case, the burden shifts to the defendants to articulate some legitimate, nondiscriminatory reason for their actions. *Id*. If the defendants articulate such a reason, the plaintiff must prove by a preponderance of the evidence that the defendants' reasons were a mere pretext for discrimination. *Id*.

While disputed by defendants, plaintiff presented evidence that the dog search indicated that two male officers could also have been concealing drugs but were not subjected to a strip search. Additionally, one other male corrections officer had been accused by a prisoner of smuggling drugs into the facility but was not targeted for screening by a dog or subjected to a strip search. Based on the conflicting testimony, and giving the benefit of any reasonable doubt to plaintiff, a genuine issue of material fact exists as to whether other male corrections officers were similarly situated to plaintiff. Therefore, summary disposition was not appropriate on plaintiff's disparate treatment claim.

Finally, the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. *People v Champion*, 452 Mich 92, 97-98; 549 NW2d 849 (1996). Searches and seizures conducted without a warrant are unreasonable unless within certain established exceptions which balance the individual's privacy interests against the government's interests. *Id*. Federal courts have held that warrantless strip searches of corrections officers within correctional facilities are not per se violative of the Fourth Amendment but rather are governed by a reasonable suspicion standard. *McDonell, supra* at 1306; *Carey, supra* at 203-204. The court in *Carey* went on to require a search warrant for a visual body-cavity search like the one experienced by plaintiff. *Id.* at 208. Under either DOC's internal search policy, or the reasonable suspicion standard established by the federal courts, an issue of material fact exists as to whether reasonable suspicion existed in the present case justifying the strip search of plaintiff. Therefore, summary disposition is not appropriate on plaintiff's constitutional claims.

Reversed and remanded.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ Joel P. Hoekstra